IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
June 26, 2007 Session

STATE OF TENNESSEE v. DAVID NATHANIEL COPE

Appeal from the Criminal Court for Washington County
No. 31799 Robert E. Cupp, Judge

No. E2006-01005-CCA-R3-CD - Filed September 19, 2007

The defendant, David Nathaniel Cope, appeals his conviction of Driving Under the Influence (DUI), a Class A misdemeanor, and resulting sentence of eleven months and twenty-nine days, with forty-six hours to be served in confinement. He argues that the trial court erred in denying his motion to dismiss on the basis that the charging instrument was void. We affirm the defendant's conviction. However, we discern an error in the judgment form, and we remand the case for a modified judgment to reflect that the defendant is to serve forty-eight hours in confinement.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed in Part; Case Remanded for Correction of Judgment

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which THOMAS T. WOODALL and D. KELLY THOMAS, JR., JJ., joined.

Jack T. Marecic, Rogersville, Tennessee, for the appellant, David Nathaniel Cope.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Anthony Wade Clark, District Attorney General; and Michael Rasnake, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The defendant was arrested on March 18, 2005, by Washington County Sheriff's Officer Jerry Bennet, who stated in the affidavit of complaint the following:

> At approximately 20:45 I received a call for a standby at 6319 Kingsport Hwy Apt # B3[.] When I arrived the defendant was not at the residence. Ms Courtney Sells was trying to [find] a way to get into her apartment. The defendant had taken her key to the residence. They were living together. The defendant (Mr Cope) drove up in a 1998 Gray Chevrolet [Lumina]. As Mr Cope was walking across the

> road Mr Cope staggered[.] As he approached me I could smell a strong odor of alcohol on his breath. Mr Cope's speech was slurred and eyes bloodshot. Mr Cope refused to do a field sobriety test. Mr Cope was then arrested and transported to WCDC.

(modifications in capitalization made).

The defendant was originally charged and convicted in Washington County General Sessions Court of DUI and violation of the implied consent law. See T.C.A. §§ 55-10-401, -406. He appealed the judgments to the Washington County Criminal Court. Although it is not contained in the record, both parties acknowledge that before his Criminal Court trial, the defendant filed a motion to dismiss his charges on the basis that the charging instrument–the arrest warrant–was insufficient. The trial court denied this motion, and after a bench trial, the defendant was convicted of DUI, and his implied consent charge was dismissed. The record on appeal does not contain a transcript of the trial.

On appeal, the defendant contends that the trial court erred in denying his motion to dismiss. He argues that the arrest warrant, including Officer Bennet's affidavit, does not sufficiently allege that he committed the offense of DUI in that the affidavit does not include information related to where the defendant was driving, which is an element of the offense. The state counters that the defendant has waived the issue for failing to include a copy of the motion to dismiss in the record and for not raising this issue at the pretrial motion hearing and, instead, agreeing to a bench trial.

We first address the state's waiver argument. It is true that the appellant has the duty of providing an adequate record on appeal. See Tenn. R. App. P. 24(b). In the absence of material in the record that is necessary for a fair, accurate, and complete account of what transpired in the trial court, this court must presume that the trial court's rulings were supported by sufficient information. State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991). In the present case, the motion for dismissal which forms the basis of the defendant's appeal is not included in the record. The record does contain the trial court's written order denying the motion. As this appeal is from the trial court's denial of the motion, which is adequately memorialized in the record, and the issue relates to the sufficiency of the warrant to charge DUI, we will consider the issue.

We also choose to review the merits of the defendant's argument despite the state's claim that the defendant waived the issue for failure to challenge the warrant in the pretrial motion. The record reflects that the defendant's motion to dismiss came before the trial court on January 6, 2006. On that date, a pretrial motions hearing was conducted, during which the parties and the court discussed the state's motion to remand the case to General Sessions Court and ultimately agreed to a subsequent court date at which the date of the bench trial would be set. The transcript of this January 6 hearing does not reflect a discussion of the defendant's motion to dismiss, although the trial court's written order of the same date states that both the state's motion to remand and the defendant's motion to dismiss were heard and denied. The defendant raised the issue of the insufficiency of the warrant in his motion for a new trial, and the trial court stated that it found no

merit to the defendant's contention. By filing the motion to dismiss and raising the issue in his motion for a new trial, the defendant has sufficiently preserved the issue on appeal.

As it relates to the defendant's contention, our court has held that even for a misdemeanor offense, the charging instrument must allege the commission of an offense in order to be valid. State v. Morgan, 598 S.W.2d 796, 797 (Tenn. Crim. App. 1979). This is because both the United States and Tennessee constitutions guarantee an accused "the right to be informed of the nature and cause of the accusation." State v. Hill, 954 S.W.2d 725, 727 (Tenn. 1997) (citing U.S. Const. amend. VI, XIV; Tenn. Const. art. I, § 9). In Morgan, this court held that the warrant charging the defendant with DUI was insufficient because it failed to allege facts supporting that offense in that it did not allege an essential element of the offense–that the defendant was operating a vehicle. 598 S.W.2d at 797. More recently, in Hill, our supreme court held that "an indictment is valid if it provides sufficient information (1) to enable the accused to know the accusation to which answer is required, (2) to furnish the court adequate basis for the entry of a proper judgment, and (3) to protect the accused from double jeopardy." 954 S.W.2d at 727. Thus, the court affirmed the defendant's conviction for aggravated rape, even though the indictment did not allege facts related to the defendant's mental state, because the required mental state could be inferred from the nature of the criminal conduct alleged and the language of the indictment provided adequate notice of the offense alleged. Id. at 729.

We hold that the warrant in the present case sufficiently alleges the offense of DUI. DUI is defined in Tennessee Code Annotated section 55-10-401(a):

> (a) It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or on any streets or alleys, or while on the premises of any shopping center, trailer park or any apartment house complex, or any other premises which is generally frequented by the public at large, while:
>
> (1) Under the influence of any intoxicant, marijuana, narcotic drug, or drug producing stimulating effects on the central nervous system; or
>
> (2) The alcohol concentration in such person's blood or breath is eight-hundredths of one percent (.08 %) or more.

The warrant alleges that the defendant drove to his apartment, appeared to be intoxicated, and refused to take a field sobriety test. The defendant points out that the warrant only alleges that the defendant "drove up" in a vehicle without alleging that the defendant was driving in any of the locations required under the DUI statute for the commission of that offense. However, Officer

Bennett stated in his affidavit that he was standing outside the defendant's apartment residence when the defendant "drove up" and that the defendant "was walking across the road," from which one may infer that the defendant was driving on the road or on the premises of the apartment complex. The warrant was sufficient to give the defendant notice of the charge against him, and the defendant's argument is without merit.

We do discern error, however, in the defendant's sentence. Both the transcript of the motion for a new trial hearing and the judgment form reflect that the defendant's eleven-month, twenty-nine-day sentence was suspended except for forty-six hours to be served in confinement. Under our code section 55-10-403(a)(1), a person convicted of a first-offense DUI must serve, at a minimum, forty-eight hours in confinement. Defendants can, of course, be given credit for time served; however, the judgment form should reflect the total sentence given. Because the defendant's criminal court judgment form reflects an incorrect sentence, we remand for a modified judgment form to reflect that the defendant's sentence is eleven months and twenty-nine days, with forty-eight hours in confinement.

Based on the foregoing and the record as a whole, we affirm the defendant's conviction but remand the case to the Washington County Criminal Court for a corrected judgment.

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JOSEPH M. TIPTON, PRESIDING JUDGE